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No. 90-1272

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

TRUMAN E. BULLARD -
PETITIONER

vs.

EDWARD R. MADIGAN, SECRETARY
[FORMERLY, CLAYTON YEUTTER]
U. S. DEPARTMENT OF AGRICULTURE -
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE

TO THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

REPLY TO ARGUMENT.....1

CONCLUSIONS.....12

TABLE OF AUTHORITIES CITED CASES

CASES:

Birch v. Lehman,
677 F.2d 1006 (4th Cir. 1982), cert. denied, 459 U.S. 1103(1983).....2, 4

Donaldson v. Tennessee Valley Authority
759 F.2d 535 (6th Cir. 1985).....5

Irwin v. Veterans Administration, 111 S.Ct. 453 (1990).....4

Martinez v. Orr, 738 F.2d 1107 (10th Cir. 1984) 5, 7

Nordell v. Heckler, 749 F.2d 47, (D.C. Cir. 1984).....5, 7

Wood v. U. S. Postal Service, S.Ct. 90-6553, April 15, 1991.....6

Woods v. Ball
Civil Action No. 88-142-CIV-4 (E.D.N.C. June 2, 1989).....2

STATUTES:

United States Code

Title 5, Section 3309.....9

Title V of the Rehabiliaation Act, Section 501 Section 503, and Section 504.....8

Title 28, Section 1331.....9

Title 29, Sections 791, 793 and 794.....9

Title 38, Section 2011.....9

Title 38, Section 2012.....8

Title 42, Section 2000e-16(c).....6, 9

ACTS:

Civil Rights Act of 1964, TiTle VII, 42 U.S.C. 2000e- et seq,.....6

Civil Service Act of 1883.....8

Rehabilitation Act of 1973, 29 U.S.C. 791 or 793 or 794.....9

Veterans Preference Act of 1944.....8

Veterans Readjustment Act of 1974 and 1976....8

CODE Of FEDERAL REGULATIONS (CFR):

29 CFR, Section 1613.234...2, 3, 4, 5, 6, and 7

29 CFR, Section 1613.234(b)(1).....6

OTHER:

North Carolina General Statutes

Section 128-15.....8

Section 128-15.3.....8

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REPLY BRIEF IN OPPOSITION

Petitioner, Truman E. Bullard, respectfully replies to the BRIEF FOR THE RESPONDENT IN OPPOSITION under Rule 15.6 of the RULES OF THE SUPREME COURT OF THE UNITED STATES.

REPLY TO ARGUMENT

Respondent contends that although the courts of appeal were divided over whether a

request for reopening tolled the time for seeking judicial review under the Equal Employment Commission's (EEOC) former regulations the issue does not warrant review here (Res. 5). This is a specious argument. It appears to the petitioner that Solicitor General Kenneth W. Starr's contention is, that the issue has long since been resolved and that petitioner is probably the "Last of the Mohicans" with respect to this issue, the petitioner points to the continued use of the Birch v. Lehman, 677 F.2d 1006 (1982), cert. denied, 459 U.S. 1103 (1983) precedent by courts in the Fourth Circuit. See, for example, Woods v. Ball, No. 88-142-CIV-4, June 1, 1989 (Pet. 16) where Woods received his decision from the EEOC on October 8, 1988 after the November 20, 1987 effective date of 29 Code of Federal Regulations (CFR) Section 1613.234(b) and then timely requested to reopen which was denied, but was dismissed by the court under the Birch precedent as was this petitioner.

This is counter to Solicitor General Starr's contention that there is no longer conflict in the circuits regarding the tolling issue under the EEOC's new regulation (Res. 6).

Solicitor General Starr concedes that "* * * it is now clear that parties may seek reopening at the agency level without impairing their ability to seek judicial review within the statutory time limits. The time limits for seeking judicial review run from 'final' decisions, and a timely petition for reopening 'tolls the period for judicial review of the original order, which can therefore be appealed to the courts directly after the petition for reconsideration is denied'" (Res. 5). This appears to the petitioner to be a clear admission by Solicitor General Starr that the petitioner was correct in his interpretation of 29 CFR 1613.234 when the petitioner timely petitioned to reopen the initial decision of the EEOC. The correct interpretation of 29 CFR 1613.234 appears to have been settled in favor of the petitioner, the 6th, 10th and D.C.

Circuits and against in the 4th and 9th Circuits. As such Birch has in effect been overturned to the point that reopening is not a total bar to redress by the courts; which is the standard used in DISMISSING petitioner's COMPLAINT. Further, the principal of "equitable tolling" has recently been settled in Irwin v. Veterans Administration, 111 S.Ct. at 453 (1990). The perceived argument that the petitioner should be denied his day in court for a "correct" interpretation of 29 CFR 1613.234 based on a "wrong" interpretation by the 4th Circuit (Birch) appears patently inconsistent with all legal principals known to the petitioner.

Also the argument that "* * *the merits of the tolling issue under the EEOC's former regulation, * * * is of no continuing importance * * *" (Res. 5) is dangerously inaccurate. All case law that sets precedents is always of continuing importance. The petitioner perceives that the Solicitor Genera

Starr argues to allow the incorrect interpretation of 29 CFR 1613.234 in Birch to stand sets the precedent for the next case seeking to let conflicts between the circuits stand so that each circuit can continue in its own direction of interpretations of the law.

Solicitor General Starr further appears to contend that the petitioner's position that the original regulation (29 CFR 1613.234) allowed a complainant to file in court after receipt of the EEOC response to a request to reopen, when that request to reopen was filed within 30 days of receipt of the decision being reopened, is at best a "garden variety claim of excusable neglect" (Res. 6). The petitioner must presume based on his perception of Solicitor General Starr's contention, that he (Starr) would also consider that same conclusion by the courts in Donaldson v. Tennessee Valley Authority, 759 F.2d 535, 538 (6th Cir. 1985); Nordell v. Heckler, 749 F.2d 47, 49-50 (D.C. Cir. 1984); and Martinez v. Orr, 738 F.2d 1107, 1112 (10th Cir. 1984) all holding the same as the

petitioner that despite the EEOC's allowance of multiple petitions for reopening, granting or denial of a request to reopen would be a "final agency action" if the request were filed within 30 days of the EEOC's decision being reopened, to be "garden variety" conclusions with respect to the original regulation 29 CFR 1613.234. The petitioner's interpretation, which has been conceded as correct (that he was entitled to toll the time limits in 42 U.S.C. 2000e-16(c) by requesting to reopen his complaint within 30 days), appears to be worthy of consideration based on Wood v. U. S. Postal Service, S.Ct. 90-6553, April 15, 1991.

The argument that the promulgation of 29 CFR 1613.234(b)(1) does not aid petitioner is misplaced. This promulgation was not a new regulation nor a new right or procedure. It was merely a clarification of the existing right and procedure. This promulgation actually eliminated the practice of tolling the time limit in 42 U.S.C. 2000e-16(c) by any

filing of a request to reopen which some had enjoyed to only allowing those filed within 30 days. The petitioner was not untimely under the original nor the clarified regulation.

Petitioner was not aware of the Birch decision when the petitioner requested to reopen his complaint under 29 CFR 1613.234. The petitioner did not believe that the regulations implementing this system created by Congerss to be utilized by laypersons needed to be "Shepardized" before being relied upon in processing administrative actions. Petitioner had learned of cases which petitioner believes were Nordell and Martinez that allowed tolling of the time limit for filing in court by requesting to reopen and was advised by EEOC Agent, Ms. Zia Shostal, of the EEOC's interpretation of 29 CFR 1613.234 and relied upon this information and Ms. Shostal's interpretation when petitioner filed within the 30 day time limit referenced in the cases and by Ms. Shostal when petitioner requesting to reopen.

Solicitor General contends that "* * * this case did not involve an independent claim of a denial of a veteran's preference * * *." (Res. 7, Footnote 4). This claim is in error. In petitioner's March 9, 1979 letter providing notice of his formal complaint the petitioner listed the following allegations: Violation of 1] the Veterans Preference Act of 1944; 2] Civil Service Act of 1883; 3] North Carolina General Statutes, Section 128-15 (veterans preference) and Section 128-15.3 (discrimination against the handicapped); 4] Veterans Readjustment Act of 1974 and 1976 (38 U.S.C. Section 2012); 5] Title V of the Rehabilitation Act, Section 501, Section 503, and Section 504, see Exhibit 1, page 2 of 9 of the Report of Investigation, File Number At-303-88, dated December 5, 1979.

The petitioner pursued these issues continuously throughout this case. The Agency not the petitioner determined the procedures under which they would consider these claims.

Petitioner's COMPLAINT also followed through on these complaints by filing under the JURISDICTION of 5 U.S.C. 3309, 28 U.S.C. 1331, 29 U.S.C. 791 or 793 or 794, 38 U.S.C. 2011, and 42 U.S.C. 2000e-16. Petitioner's claim of denial of veteran's preference was and is an independent claim in this case.

CONCLUSION

To eliminate the acknowledged conflict between the circuits, to put a stop to the improper use of the Birch precedent as occurred in Woods, to avoid creating the precedent that continuing conflicts between the circuits are a proper state of the law, and to grant the petitioner redress as he has always been entitled based on the clarification of 29 CFR 1613.234, the Petitioner pleads that his petition for a writ of certiorari should be granted.

The respondent's request, on the other hand, appears to be that since several others have been denied their rights to redress by the

4th and 9th Circuits that this Court should follow suit herein; that is to grant the 4th and 9th Circuits one last hurrah, or give them one more for the "Gipper" or to deny redress to petitioner because petitioner is perceived to be the last "Mohican"; Please??!!??!!!!.

DATED: 27 th day of April 1991

Respectfully Submitted,

Truman E. Bullard

TRUMAN E. BULLARD, Pro Se